

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

FERNANDO C. C.,

Plaintiff,

v.

**COMMISSIONER, SOCIAL SECURITY
ADMINISTRATION,**

Defendant.

Case No. 3:18-cv-01728-BR

**ORDER GRANTING PLAINTIFF’S
MOTION FOR ATTORNEY’S FEES
PURSUANT TO 42 U.S.C. § 406(b)**

IMMERGUT, District Judge.

Plaintiff Fernando C. C. brought this action seeking review of the Commissioner’s final decision denying his application for Disability Insurance Benefits (“DIB”) under Title II of the Social Security Act. Complaint, ECF 1. On September 26, 2019, the Court reversed the Commissioner’s decision and remanded the case for further proceedings. Judgment, ECF 20. Upon remand, Plaintiff received a favorable decision and the Commissioner found Plaintiff entitled to DIB beginning December 2014. Declaration of Nancy J. Meserow, ECF 27 ¶ 3.

Plaintiff's counsel now seeks an award of fees pursuant to 42 U.S.C. § 406(b). Motion for Attorney's Fees ("Mot."), ECF 26. The Commissioner has not objected to the amount of the award. *See* Commissioner's Response ("Resp."), ECF 28. This Court has reviewed the record in this case, the motion, and the supporting materials, including the award of benefits, the fee agreement with counsel, and the recitation of counsel's hours and services. Applying the standards set by *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002), this Court finds that the total fee award requested by counsel and allowed for under § 406(b), \$37,266.00, is reasonable.

While the Commissioner does not dispute the amount of the award, it does dispute the wording to be used in this Order. The Commissioner insists that § 406(b) does not authorize an order directing the Commissioner to pay attorney's fees, and the Commissioner urges this Court to avoid verbiage "directing" the Commissioner to "pay" the attorney's fees. Resp., ECF 28 at 2–4. At bottom, the Commissioner appears concerned about being on the hook for attorney's fees in the event of a shortfall of withheld funds. The Proposed Order provided by Plaintiff's counsel, Mot., Att. 2, ECF 26-2, complies with this request, as does this Court's Order below.

The Commissioner also notes that when an attorney receives fees under the Equal Access to Justice Act ("EAJA") and § 406(b), the attorney must refund the smaller fee award to the claimant. *See* Resp., ECF 28 at 3–4. This Order provides for that. Here, Plaintiff's counsel asks this Court to apply the "netting method," which subtracts the previously awarded EAJA fees from the § 406(b) fee award.¹ Mot., ECF 26 at 2. The Commissioner further requests that this Court determine the reasonableness of the total § 406(b) award, not the net amount. As discussed

¹ *See Linnan v. Kijakazi*, No. 3:19-cv-00225-LRH-WGC, 2021 WL 4190636, at *5 (D. Nev. Aug. 26, 2021) (explaining that "[s]ome district courts within th[e] Ninth [C]ircuit . . . simply allow the EAJA award to be offset or subtracted from the [§] 406(b) fee award" and collecting cases), *report and recommendation adopted*, No. 3:19-CV-00225-LRH-WGC, 2021 WL 4189607 (D. Nev. Sept. 14, 2021).

above, this Court assessed the reasonableness of the full § 406(b) fees sought. All of the Commissioner's concerns have been addressed by this Order.

Plaintiff's Motion for Attorney's Fees Pursuant to 42 U.S.C. § 406(b), ECF 26, is hereby GRANTED, and Plaintiff's counsel is awarded \$27,589.20 in attorney's fees under 42 U.S.C. § 406(b). Previously, this Court awarded Plaintiff's counsel \$9,676.80 in fees under the EAJA. Order, ECF 23. When issuing the § 406(b) check for payment to Plaintiff's counsel, the Commissioner is directed to subtract the amount previously awarded under EAJA and send Plaintiff's counsel, Nancy J. Meserow, the balance of \$27,589.20, less any applicable processing fee prescribed by law. The § 406(b) check should be mailed to Nancy J. Meserow, Law Office of Nancy J. Meserow, 7540 SW 51st Avenue, Portland, OR 97219.

IT IS SO ORDERED.

DATED this 24th day of October, 2023.

/s/ Karin J. Immergut
Karin J. Immergut
United States District Judge